FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARK DUFFER, an individual, on behalf of himself and all others similarly situated, Plaintiff,	)	
v.	)	Case No.: 13-cv-3756
UNITED CONTINENTAL HOLDINGS, INC., a Delaware Corporation; UNITED AIR LINES, INC., a Delaware Corporation; CONTINENTAL AIRLINES, INC., a Delaware Corporation; AIR LINE PILOTS ASSOCIATION, INT'L, an unknown business entity; inclusive,	)	Honorable John Robert Blakey
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

I. INTRODUCTION 1

II. SUMMARY OF RELEVANT FACTS 1

A. Post-Merger Lump Sum Payment 1

B. The Company's Methodology for Calculating DC Plan Contributions for Pilots Relating to Military Leave 4

C. The Company's Policy Regarding Verification of Military Leave 4

III. STANDARD FOR MOTION FOR SUMMARY JUDGMENT 6

IV. OVERVIEW OF USERRA 6

V. ARGUMENT 8

A. Defendants have Violated USERRA by Excluding Military Leave Periods from the Lump Sum Allocation as Set Forth in Count I 8

B. Plaintiff Was Not Obligated to Participate in the Bloch Arbitration And The Bloch Opinion Is Irrelevant 12

C. The Company's Former Methodology for Calculating DC Plan Pension Contributions for Pilots Relating to Military Leave Violates USERRA as Set Forth in Count II 17

D. The RLA Does Not Deprive the Court of Jurisdiction Over Any of Plaintiff's Claims 20

E. The Company's Policy and Practice Regarding Verification of Military Leave Violated USERRA as Set Forth in Count III 23

F. ERISA Does Not Preempt Plaintiffs' State Law Claims (Counts IV & V), because they Are Derivative of the USERRA Claims 27

G. Plaintiff's Negligence Claim is not Preempted (Count V) 29

VI. CONCLUSION 30

TABLE OF AUTHORITIES

Cases

14 Penn Plaza LLC v. Pyett,
556 U.S. 247 (2009) 14

Accardi v. Pennsylvania R.R. Co.,
383 U.S. 225 (1966) 10

Ackerman v. Western Electric Co.,
860 F.2d 1514 (9th Cir. 1988) 22

Alabama Power Co. v. *Davis*,
431 U.S. 581 (1977) 11

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 17

Atchison, Topeka & Santa Fe Ry. Co. v. Buell,
480 U.S. 557 (1987) 21, 22

Beckley v. Lipe–Rollway Corp.,
448 F.Supp. 563 (N.D.N.Y.1978) 16

Benson v. Northwest Airlines,
62 F.3d 1108 (8th Cir. 1995) 22

Blakely v. USAirways, Inc.,
23 F. Supp. 2d 560 (W.D. Pa. 1998) 21

Breletic v. CACI, Inc.-Federal,
413 F.Supp.2d 1329 (N.D. Ga. 2006) 14

Brown v. Ill. Cent. R.R.,
254 F.3d 654 (7th Cir. Ill.2001) 21

Butner v. Boehringer Ingelheim Pharms., Inc.,
2014 U.S. Dist. LEXIS 3946 (S.D. Ill. 2014) 29

Carpenter v. Northwest Airlines, Inc.,
2001 U.S. Dist. LEXIS 24622 (D. Minn. June 7, 2001) 21

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 6

Coffy v *Republic Steel Corp.*,
447 U.S. 191 (1980) 11

Duarte v. Agilent Technologies, Inc.,
366 F.Supp.2d 1039 (D. Colo. March 31, 2005) 12

Espinal v. Northwest Airlines,
90 F.3d 1452 (9th Cir. 1996) 22

Evan V. v. Hughson United Methodist Church,
8 Cal. App. 4th 828 (1992) 29

Felt v. Atchison, Topeka & Santa Fe Railway Co.,
60 F.3d 1416, 1419 (9th Cir. 1995) 22

Finnane v. Pentel of Am., Ltd.,
2000 U.S. Dist. LEXIS 22172 (N.D. Ill. 2000) 30

Fishgold v. Sullivan Drydock & Repair Corp,
328 U.S. 275 (1946) 12, 13, 16

Garrett v Circuit City Stores, Inc.,
449 F.3d 672 (5th Cir. 2006) 15, 16

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 16

Goggin v. *Lincoln, St. Louis*,
702 F.2d 698 (8th Cir. 1983) 11

Gore v. TWA,
210 F.3d 944 (8th Cir. 1999) 16, 21

Hawaiian Airlines, Inc. v. Norris,
512 U.S. 246 (1994) 22

Humana Inc. v. Forsyth,
525 U.S. 299 (1999) 28

J'Aire Corp. v. Gregory,
24 Cal. 3d 799 (1979) 29

Jimeno v. Mobil Oil Corp.,
66 F.3d 1514 (9th Cir. 1995) 22

Kidder v. Eastern Air Lines, Inc.,
469 F.Supp. 1060 (S.D.Fla.1978) 16, 22

Kitts v. Menards, Inc.,
519 F. Supp. 2d 837 (N.D. Ind. 2007) 15

Klassy v. Physicians Plus Ins. Co.,
371 F.3d 952 (7th Cir. 2004) 28

Ladd v. County of San Mateo,
12 Cal. 4th 913 (1996) 29

Landis v. Pinnacle Eye Care LLC,
537 F.3d 559 (6th Cir. 2010) 15

Lennon v. Finegan,
78 F. Supp.2d 258, 259 (S.D.N.Y. 2000) 21

Lopez v. Dillard's Inc.,
382 F.Supp.2d 1245 (D. Kan. 2005)........ 8, 14

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 6

McKinney v. The Missouri-Kansas-Texas Railroad Co.,
357 U.S. 265 (1958) 13, 16

McPherson v. City of Waukegan,
379 F.3d 430, 442 (7th Cir. Ill. 2004)........ 29

Meerbrey v. Marshall Field & Co.,
189 Ill. App. 3d 1085 (Ill. App. 1989)........ 30

Saridakis v. United Airlines,
166 F.3d 1272 (9th Cir. 1999) 22

Schiltz v. Burlington N. R.R.,
115 F.3d 1407 (8th Cir. 1997) 21

Schmauch v. *Honda of America Manufacturing, Inc.*,
295 F. Supp. 2d 823 (S.D. Ohio 2003) 11

Shaw v. Delta Airlines,
463 U.S. 85 (1983) 27, 28

Stokes v. Norfolk & Southern Ry.,
99 F. Supp.2d 966 (N.D. Ind.2000)........ 20

Tully v. Dep't of Justice,
481 F.3d 1367 (Fed. Cir. 2007) 11

Waltermyer v. Aluminum Co. of America,
804 F.2d 821 (3rd Cir. 1986)........ 12

Statutes

29 U.S.C. § 1144(a) 27

29 U.S.C. § §1144(d)........ 27

38 U.S.C. §4301, et. seq........ 1

38 U.S.C. §4301(a)(3)........ 6

38 U.S.C. § 4302(a) 28

38 U.S.C. §4302(b)........ 8, 16

38 U.S.C. §4303(2)........ 7

38 U.S.C. §4311........ 7

38 U.S.C. §4323(b) 8

38 U.S.C. §4323(b)(2) 17

Rules

Fed. R. Civ. P. 56(c) 6

Regulations

20 C.F.R. § 1002.121 24

20 C.F.R. § 1002.123(b) 24

20 C.F.R. § 1002.150 11

20 C.F.R. § 1002.2 6

20 C.F.R. § 1002.212 11

20 C.F.R. § 1002.259(a) 8, 25

20 C.F.R. § 1002.262 .... 7, 25

20 C.F.R. § 1002.5(d)(1)(i) 7

20 C.F.R. § 1002.7(b) 8

20 C.F.R. §§ 1002.115 8

20 C.F.R. §1002.121 24

20 C.F.R. §1002.123(a) 24

20 C.F.R. §1002.123(b) 24

20 C.F.R. §1002.150 11

20 C.F.R. §1002.193 .... 7, 10

20 C.F.R. §1002.259(a) 8, 25

20 C.F.R. §1002.261 .... 7, 8

20 C.F.R. §1002.262 7

20 C.F.R. §1002.267(a) 18

20 C.F.R. §1002.267(b)(1) 18

20 C.F.R. §1022.260 28

Miscellaneous Authorities

Handbook on Workers' Compensation and Occupational Diseases, http://www.iwcc.il.gov/handbook020106.pdf 30

§502 of ERISA 28

§514(a) of ERISA 27

CMVC § 394 .... 27, 28, 29

I. INTRODUCTION

Plaintiff Mark Duffer ("Plaintiff") hereby submits the following Memorandum of Points and Authorities in Opposition to Defendants' Motion for Partial Summary Judgment ("MSJ").

The Air Line Pilots Association ("ALPA"), Continental Airlines, Inc. ("s-CAL"), United Air Lines, Inc. ("s-UAL"), and United Continental Holdings, Inc. ("UCH") (the latter three collectively referred to as "the Company") jointly attack the Counts related to the Uniformed Services Employment and Reemployment Act ("USERRA"), 38 U.S.C. §4301, et. seq., violations involving the Lump Sum payment causes of action contained in Counts I, IV and V of Plaintiff's Third Amended Complaint ("TAC") (ECF #152) through their MSJ (ECF #160-161). The Company additionally attacks TAC Counts II, III and IV.

The MSJ is without merit and should be denied in its entirety. Defendants have blatantly violated USERRA by excluding military leave periods in allocating the post-merger $400 million Lump Sum amount, which included money to compensate for the underfunding of pension plans, also referred to as Defined Contribution Plans ("DC Plans"). The Company Defendants have also violated USERRA by underfunding pension plan benefits by utilizing an improper methodology to calculate pension contributions for military leave periods, and by implementing an improper verification process for military leave periods that resulted in underfunding and late funding of pension benefits.

II. SUMMARY OF RELEVANT FACTS

A. Post-Merger Lump Sum Payment

On October 1, 2010, Pre-Merger s-UAL and s-CAL were part of a merger in which UCH became the parent company of both carriers. Joint Statement of Undisputed Material Facts, ECF # 158, ("SOF") ¶2. S-UAL and s-CAL were subsequently merged into a single legal entity which operates under the name United Airlines. *Id.* Defendant ALPA, a labor union, was the exclusive collective bargaining representative of the crafts or classes of flight deck crew members employed by s-UAL and s-CAL and had separate collective bargaining agreements ("CBAs") with both carriers governing various terms and conditions of employment for the respective pilot groups. *Id. at* ¶3. At each airline where ALPA is the representative, ALPA maintains a coordinating council called a Master Executive Council ("MEC")." *Id.* at ¶5.

On August 2, 2012, ALPA and the Company reached an Agreement in Principle ("AIP") regarding the terms of the United Pilot Agreement ("UPA"), which thereby became the new CBA setting forth terms and conditions of employment for the combined group. *Id.* at ¶¶ 10, 12. In the negotiations leading to the UPA, ALPA sought retroactive payments for pilots for the period from the amendable dates of the pre-merger pilot contracts until the effective date of the new contract, during which period (a) there was no increase in the contractual hourly rates of pay for the s-CAL and s-UAL pilots under the then governing CBA's and (b) the s-CAL pilots received a DC Plan contribution rate of 12.75%, which rate was prospectively increased to 16% under the UPA. *Id.* at ¶ 14.The Company refused to agree to retroactive pay, as such, but agreed to make a substantial ($400 million) Lump Sum Payment. *Id.* at ¶ 16.

In the AIP, the $400 million payment was referred to as "Retroactive pay/lump" and provided in relevant part as follows: "Term 3.20 - Lump sum $250M payable at DOS, $150M payable upon conclusion and submission to Company of single seniority list, total cost including Fringe items such as any associated **DC contribution** - allocation to be determined by ALPA." *Id.* at ¶ 18 (emphasis added). The two MECs undertook a process (agreed to by ALPA) whereby Ira F. Jaffe, an impartial arbitrator, determined how the $400 million was to be allocated between the s-UAL and the s-CAL pilot groups. *Id.* at ¶ 24. In the Jaffe arbitration, the s-CAL MEC presented various arguments that they contended should be taken into consideration in determining the allocation between the pilot groups, with a goal of increasing the s-CAL Pilot's total share of the $400M payments. *Id.* at ¶ 26. These arguments included that the DC Plan contribution rate for the s-CAL pilots was lower than the rate for the s-UAL pilots and that the lower DC Plan contribution rate for the s-CAL pilots prior to the UPA should be taken into account in the allocation between the pilot groups. *Id.* at ¶ 26(a).

On November 5, 2012 -- before the full UPA was finalized, ratified, and executed -- Arbitrator Jaffe issued his Decision and Award, concluding that the $400 million should be allocated as follows: $225 million to the s-UAL pilot group and $175 million to the s-CAL pilot group. *Id.* at ¶ 25. Mr. Jaffe found that "the difference in the DC plan contributions must be recognized when calculating retroactive pay." *Id.* at ¶ 19. He also found that "the difference in the DC plan contributions rates" under the pre-merger CBAs "must be recognized" in allocating the $400 million between the s-CAL and s-UAL pilots. *Id.* at ¶ 20. Mr. Jaffe explained that "the CAL pilots are entitled to be credited with the full 16% DC Plan contribution rate retroactively on their actual earnings and also the pay needed to bring them up to the terms of the newly negotiated joint collective bargaining agreement." Exhibit 4 of SOF, p. 5.

LOA 24 (which was attached to the UPA) calls for the Company to disburse the $400 million directly to pilots pursuant to lists (to be provided to the Company by ALPA) stating the dollar amount to which each pilot is entitled under the respective MEC allocation methodology. *Id.* at ¶ 32. As part of its allocation methodology, ALPA (through the s-CAL MEC), utilized an "Earnings Amount" and "Availability Amount" to determine each pilot's lump sum payments. *Id.* at ¶ 33. Military leave periods were completely excluded from the entire Lump Sum allocation for the s-CAL pilots and do not count towards the Availability Amount. *Id.* at ¶ 34.

B. The Company's Methodology for Calculating DC Plan Contributions for Pilots Relating to Military Leave.

On March 13, 2007, s-CAL issued a Pilot Bulletin (the "Pilot Bulletin") setting forth the methodology for how DC Plan contributions for military leave periods would be calculated:

> the Company will calculate a "daily rate" based on the average Compensation per day that the pilot earned during his previous 12 months of Active Status (that is, we will not count the months during which the pilot was on Military Leave for the entire bid period as "zero income" months, and we will look back to include an entire Active Status month during which he had no Military Leave to use in the average). That calculated "daily rate" will be multiplied by each day of Military Leave that is verified in the process described below, providing the pilot with Deemed Compensation to be used solely for the purpose of calculating the pilot's B-Plan contribution for his Military Leave period.

SOF at ¶ 62. This methodology remained in place until June 30, 2014, when the Company changed how it would calculate DC Plan contributions for all pilots on military leave greater than 30 days. *Id.* at ¶ 63.

C. The Company's Policy Regarding Verification of Military Leave

During various periods of time while employed by the Company, Plaintiff took leave to perform military service. SOF at ¶ 43. The Pilot Bulletin states: "In order to verify Military Leave, pilots with Military Leave on their schedules **must** bring a copy of their military pay records to the Chief Pilot's office at their pilot base, denoting the dates of military service that correspond to the dates of their Military Leave." *Id.* at ¶ 44 (emphasis added). Once the Company determines that a pilot has presented a document that verifies military leave on a particular day, Company personnel check a box titled "verified" in its computer system. *Id.* at ¶ 46. "Once this 'verified' box is checked, the dates of the verified leave are transmitted to the Benefits department via a regular monthly data export, typically on the fourth day of the month. Contributions are then made at some later date to the DC Plan for the periods of verified military leave." *Id.* at ¶ 47.

When Plaintiff returned from military leaves of more than 30 days he presented, and the Company accepted, documentation to establish that all of his applications for reemployment following military leave periods were timely, that he had not exceeded the protected service period, and that the conditions of his military service and discharge preserved his rights under USERRA. *Id.* at ¶¶ 48, 49. The Company does not keep records indicating the date any pilot submits documentation for military leave verification purposes. *Id.* at ¶ 54. Plaintiff's period of military leave from February 21, 2012 to February 28, 2012 has never been marked by the Company as "verified" dates of military service. *Id.* at ¶ 50. Numerous periods of military leave taken by Plaintiff while employed by the Company were "verified by" the Company more than 90 days after Plaintiff was reemployed, including but not limited to: 6/1/2011, 1/21/2009, 1/20/2009, 12/1/2008, 8/15/2008-8/17/2008, 3/1/2008-3/3/2008, 1/4/2008-1/6/2008, 9/27/2007-9/30/2007, 4/20/2007-4/23/2007, 3/25/2007, 2/26/2007, and all military leave periods taken prior to 1/6/2007. *Id.* at ¶ 53. In fact, Plaintiff's military leave on 4/23/2007, was not verified by the Company until April 2014, and Plaintiff's military leave on 6/1/2011 was not verified until August 2014. *See* Exhibits 12, 13 & 15 to the SOF.

Contributions to Plaintiff's DC Plan associated with periods of military leave were made more than 90 days after Plaintiff was reemployed. *Id.* at ¶ 64. Further, contributions to Plaintiff's DC Plan associated with periods of military leave were made more than 90 days after the leave was "verified" by the Company. *Id.* at ¶ 65. Among these late contributions was one made on September 25, 2014 in the amount of $38.68, with an additional $11.29 as investment returns on that contribution, for Plaintiff's military leave on June 1, 2011. *Id.* at ¶¶ 66-67. These payments were only made because it was revealed through discovery in this action that the June 1, 2011 leave had not been marked as "verified." *Id.*

It is undisputed that no contributions have been made to Plaintiff's DC Plan for military leave taken on April 23, 2007 and from February 21, 2012 to February 28, 2012, and no other "investment return" payments have been made for any other late DC Plan contributions. *See* Exhibits 15 and 17 to the SOF.

III. STANDARD FOR MOTION FOR SUMMARY JUDGMENT

Summary judgment may only be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). When determining whether a genuine issue of material fact exists, evidence must be considered in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

IV. OVERVIEW OF USERRA

USERRA was enacted in 1994 and is the latest in a series of laws protecting veteran employment rights. 20 C.F.R. § 1002.2. This series of laws goes back to the Selective Training and Service Act of 1940. *Id.* "In enacting USERRA, Congress emphasized USERRA's continuity with the [predecessor statutes] and its intention to clarify and strengthen that law." *Id.* Additionally, "Congress also emphasized the Federal laws protecting veteran's employment and reemployment rights for the past fifty years had been successful and that the large body of case law that had developed under those statutes remained in full force and effect, to the extent it is consistent with USERRA." *Id.*

USERRA prohibits "discrimination against persons because of their service in the uniformed services." 38 U.S.C. §4301(a)(3). USERRA prohibits the denial of any benefit of employment by an employer on the basis of an employee's membership in the uniformed services. 38 U.S.C. §4311. "Benefit" is defined as:

> [T]he terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a *pension plan*, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment."

38 U.S.C. §4303(2) (emphasis added).

Section 4316 of USERRA further provides that any period of absence from employment due to or necessitated by uniformed service is not considered a break in employment, so an employee absent due to military duty must be treated as though they were continuously employed. "The employer must determine the seniority rights, status, and rate of pay as though the employee had been continuously employed during the period of service." 20 C.F.R. §1002.193.

"In the case of a defined contribution plan, once the employee is reemployed [returns to service], the employer must allocate the amount of its make-up contribution for the employee . . . in the same manner and to the same extent that it allocates the amount for other employees during the period of service." 20 C.F.R. §1002.261. "[T]he employer is liable to the pension benefit plan to provide benefits that are attributable to the employee's period of service." *Id.* An employer must make its employees' pension plan contributions due from periods of military leave "no later than ninety days after the date of reemployment." 20 C.F.R. § 1002.262. Depending on the length of the employee's period of service, he or she is entitled to take from one to ninety days following service before reporting back to work or applying for reemployment. 20 C.F.R. §§ 1002.115, 1002.259(a). "This period of time must be treated as continuous service with the employer for purposes of determining participation, vesting and accrual of pension benefits under the plan." 20 C.F.R. § 1002.259(a).

Section 4323(b) confers jurisdiction on the district courts of the United States. 38 U.S.C. §4323(b). USERRA unequivocally states that the statute "supersedes any State law (including any local law or ordinance), *contract*, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this USERRA, including the *establishment of additional prerequisites to the exercise of any such right* or the receipt of any such benefit." 38 U.S.C. §4302(b) (emphasis added.); 20 C.F.R. § 1002.7(b). USERRA does not allow an employer to mandate any prerequisites to filing a lawsuit for violations of USERRA in a United States District Court. *Lopez v. Dillard's Inc.*, 382 F.Supp.2d 1245, 1247 (D. Kan. 2005).

V. ARGUMENT

A. Defendants have Violated USERRA by Excluding Military Leave Periods from the Lump Sum Allocation as Set Forth in Count I.

Defendants plainly violated USERRA by excluding periods of military leave from the allocation methodology of the $400 million Lump Sum amount. Pilots on military leave are entitled to receive the full pension benefits that they would have received if not on military leave. *See* 20 C.F.R. §1002.261. The $400 million unmistakably included a pension plan money component to compensate for the underfunding of the DC Plan. *See* SOF ¶¶ 14, 16, 18-20, 26. From the outset of the UPA negotiations, ALPA's ultimate goal was to secure full back pay and benefits, including pension benefits under the DC Plans, for the pilots from both s-UAL and s-CAL. Exhibit 4 of SOF, p. 15.

ALPA's own Economic and Financial Analysis ("E&FA") Department originally determined that "full" retro pay for the combined pilot group would amount to approximately

$438 million for wages and approximately $100 million (approximately 18.5% of the total package) for "benefits." *Id.* at p. 3, 6, 18-19. Although the $400 million Lump Sum payment ultimately agreed upon was less than the full amount ALPA sought initially, this Lump Sum amount undisputedly includes a DC Plan monetary component. SOF, ¶¶19-20, 26; Exhibit 4 of SOF, pp. 6-9, 18-19, 23-25. As Arbitrator Jaffe found, "[t]he fact that ALPA changed its initial retroactive pay demand from one that was based upon retroactive application of the terms of the joint collective bargaining agreement to use of the DAL wage rates . . . . provides no reason for eliminating consideration of the DC contribution component of retroactivity, to the extent that a retroactive pay method should be used in the allocation of the negotiated lump sum." Exhibit 4 of SOF, p. 6. The "retroactive DC Plan contribution rates" was a "very significant item" in determining the allocation of the Lump Sum. Exhibit 4 of SOF, p.25.

When adjusting the E&FA model data to take into account the lower s-CAL DC Plan contribution rates, Arbitrator Jaffe determined that the "Retroactive Pay Due to DC Plan Contributions Associated with the Increase in Pay Resulting from the Use of DAL Rates" amounted to an additional $94 Million for the s-CAL Pilots, as compared to an additional $47.2 Million for the s-UAL Pilots. Exhibit 4 of SOF, at pp. 7-8. This amount of $94 Million due to s-CAL Pilots for DC Contributions accounted for over 30% of the total $247.3 Million of the full retroactive pay due to s-CAL pilots under the E&FA model. *Id.*

Defendants' repeated statements that the $400 million should be treated exclusively as "wages" completely ignores the undisputed fact that the Lump Sum amount includes a DC Plan monetary component. SOF, ¶¶19-20, 26; Exhibit 4 of SOF, pp. 6-9, 18-19, 23-25. "[E]mployers and unions are [not] empowered by the use of transparent labels and definitions to deprive a veteran [or reservist] of substantial rights guaranteed by [USERRA]." *Accardi v. Pennsylvania*

R.R. Co., 383 U.S. 225, 229 (1966). In unilaterally labeling the $400 million as "wages," the Defendants are attempting to take a portion of the total funds that should include pension benefits owed military-affiliated pilots and then distribute those benefits to other s-CAL pilots who had no military obligations. This is discriminatory on its face.

The DC Plan monetary component of the Lump Sum was so significant for the s-CAL pilot group that ALPA (through s-CAL MEC) created 2 separate funds, one for wages (the "Earnings" portion) and one clearly designed for inclusion of benefits (the "Availability" portion) which provided a vehicle by which the DC Plan contribution monetary component could be distributed to the s-Cal pilots. The Defendants merely chose to exclude military leave from the allocation of this DC Plan money being distributed through the Availability portion. This exclusion was unlawful, as USERRA mandates that Plaintiff and the putative Class be provided DC Plan contribution money for periods of military leavers as though they "had been continuously employed during the period of service." 20 C.F.R. 1002.193.

Plaintiff Duffer does not allege that he is entitled to wages while on military leave, and for that reason he is not attacking the "Earnings" portion of the s-CAL ALPA methodology. He does rightfully maintain that he and the putative Class are entitled to the same pension benefits as those pilots who had no military obligations and that his absences due to military service should be included in the "Availability" portion of the Lump Sum.

To the extent that the "Availability" portion of the Lump Sum money includes benefits beyond pension benefits, those benefits were also seniority-based benefits. Without any discussion or analysis, Defendants unilaterally state that the Lump Sum payments are non-seniority based. ECF #161, p.14. However, the "Availability" portion of the s-CAL MEC formula squarely fits the definition as a "reward for length of service" (months of availability), and Plaintiff absolutely would have "received the right or benefit if he . . . had remained continuously employed." Exhibit 6 of SOF; 20 C.F.R. § 1002.212.[1]

Even if the Court determines that the "Availability" portion of the Lump Sum amount consisted of non-seniority based benefits, it is undisputed that pilots on other forms of comparable leave such as sick leave and jury duty had their entire leave periods included in the "Availability" portion of the s-CAL MEC's formula. Exhibit 6 to SOF.[2] Employees on military leave are entitled to receive the same non-seniority benefits that are provided to employees on comparable forms of leave. 20 C.F.R. § 1002.150 ("If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services"); *see also Waltermyer v. Aluminum*

[1] The benefit must be provided as a reward for length of service and the service member's receipt of the benefit, but for his or her absence due to service, must have been reasonably certain. *See Coffy* v *Republic Steel Corp.,* 447 U.S. 191, 197– 98 (1980); *Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977); see also S. Rep. No.103–158, at 57 (1993), citing with approval *Goggin* v. *Lincoln, St. Louis,* 702 F.2d 698, 701 (8th Cir. 1983) (summarizing Supreme Court formulation of two-part definition of ''perquisites of seniority''). "A seniority-based right or benefit is one that accrues with, or is determined by, longevity in employment. Generally, whether a right or benefit is seniority-based depends on three factors:

> (a) Whether the right or benefit is a reward for length of service rather than a form of short-term compensation for work performed;
> (b) Whether it is reasonably certain that the employee would have received the right or benefit if he or she had remained continuously employed during the period of service; and,
> (c) Whether it is the employer's actual custom or practice to provide or withhold the right or benefit as a reward for length of service. Provisions of an employment contract or policies in the employee handbook are not controlling if the employer's actual custom or practice is different from what is written in the contract or handbook."

20 C.F.R. § 1002.212.

[2] Courts do not differentiate types of leaves based on being a paid leave or an unpaid leave. *See, e.g., Tully v. Dep't of Justice*, 481 F.3d 1367, 1372 (Fed. Cir. 2007). Courts have also found jury duty to be comparable to military leave. *Schmauch* v. *Honda of America Manufacturing, Inc.*, 295 F. Supp. 2d 823 at 836–839 (S.D. Ohio 2003) (employer improperly treated jury duty more favorably than military leave). The duration of the leave may be the most significant factor to compare, but in addition to factors such as duration, some courts have used the voluntariness of an absence. *See, e.g., Tully v. Dep't of Justice*, 481 F.3d 1367 (Fed. Cir. 2007). In this instance we are comparing absences that could be for similar time periods, covered entire months and are generally involuntary, indicating that military leave is comparable to other forms of leave that were included in the "Availability" portion of the CAL MEC Retro/Lump Sum formula.

Co. of America, 804 F.2d 821 (3rd Cir. 1986). Defendants have discriminated against military-affiliated pilots by excluding military leave from the "Availability" portion of the formula while including other comparable forms of leave.

B. Plaintiff Was Not Obligated to Participate in the Bloch Arbitration And The Bloch Opinion Is Irrelevant.

Defendants argue that they are entitled to summary judgment on Count I based on the contention that Plaintiff is bound by a contractual dispute resolution process to arbitrate his USERRA claims. This claim is without merit. Plaintiff did not participate in the Bloch arbitration. SOF, ¶ 40.[3] Further no attorneys made formal appearances for any Appeal Pilots in the Bloch arbitration. Exhibit 9 to SOF, p.1 [FN1]. Defendants also improperly attempt to bring forth the Bloch arbitration decision as some sort of precedent over the factual and legal issues presented in this case. The Bloch decision is preempted by USERRA and must be disregarded.

USERRA and its predecessor statutes are to be interpreted broadly and in favor of the servicemember, as Congress intended when passing each successive statute.[4] In keeping with Congress' intent to interpret USERRA in favor of the servicemember, the Supreme Court has long upheld their rights to have cases for violations of USERRA heard in a federal district court and not by arbitration. These cases remain binding precedent on this Court and have not been overruled by any authority Defendants cite in their moving papers. Defendants simply ignore the cases on point decided by the Supreme Court because they stand for the proposition that compulsory arbitration provisions in collective bargaining agreements are preempted by USERRA and fly in the face of USERRA's purpose.

---

[3] Plaintiff filed his original Complaint in the United States District Court, Southern District of California on February 8, 2013, alleging the same claim relating to the Lump Sum Payout that exists in the TAC. *See* ECF #1 ¶¶ 52-61; ECF #152 ¶¶ 72-81. Twenty days *after* filing his Complaint, Plaintiff and his counsel appeared before the ALPA Executive Counsel, having informed them that the lawsuit was pending, in an effort to avoid protracted litigation and to allow ALPA and the Company to abide their obligations under USERRA. Defendants ignored Plaintiff's efforts and elected to continue their unlawful allocation methodology of the Lump Sum Payout, and, accordingly, the current litigation remained pending. Defendants' disingenuous assertion that Plaintiff lost and abandoned the "dispute resolution process" is misleading; the Complaint was filed first, and Plaintiff did not abandon any claims or process, as he was not, and is not, bound by the dispute resolution process set forth in LOA 24.

[4] "In enacting USERRA, Congress emphasized USERRA's continuity with [predecessor statutes] and its intention to clarify and strengthen [those] law[s]." 20 CFR § 1002.2; *see also*, H.R.Rep. No. 103–65 at 23 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2456 ("The Committee intends that these anti-discrimination provisions be broadly construed and strictly enforced"); *Fishgold v. Sullivan Drydock & Repair Corp*, 328 U.S. 275, 285 (1946) ("This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."); *Duarte v. Agilent Technologies, Inc.*, 366 F.Supp.2d 1039 (D. Colo. March 31, 2005)(USERRA and its predecessor statutes are to be liberally construed for the benefit of those who left private life to serve their country).

Beginning with a case involving the Selective Training and Service Act of 1940, one of USERRA's predecessor statutes, the Supreme Court stated, "[n]o practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the act." *Fishgold v. Sullivan Drydock & Repair Corp*, 328 U.S. 275, 285 (1946). Twelve years later, in a case involving the Universal Military Training and Service Act, the Supreme Court reiterated the servicemember's right to have his case heard in District Court without adhering to any administrative remedy provision in a collective bargaining agreement. *McKinney v. The Missouri-Kansas-Texas Railroad Co,* 357 U.S. 265 (1958). In holding in favor of the servicemember, the Supreme Court stated that "[t]he rights petitioner asserts are rights created by federal statute even though their determination may necessarily involve interpretation of a collective bargaining agreement." *Id.* at 269. "Petitioner sues not simply as an employee under a collective bargaining agreement, but as a veteran asserting special rights bestowed upon him in furtherance of a federal policy to protect those who have served in the Armed Forces." *Id.* "To insist that the veteran first exhaust other possibly lengthy and doubtful procedures on the ground that his claim is not different from any other employee grievance or claim under a collective bargaining agreement would ignore the actual character of the rights asserted and defeat the liberal procedural policy clearly manifested in the statute for the vindication of those rights." *Id.* at 270.

This line of reasoning has been followed by lower courts throughout the years and is in keeping with the protections afforded the servicemember by USERRA. "Any additional prerequisite to the exercise of a plaintiff's rights and the receipt of benefits under USERRA, including such aspects as a specifically agreed to arbitration agreement, is a violation of the plain language of USERRA." *Lopez*, 382 F. Supp.2d at 1248 (D. Kan. 2005). *See also*, *Breletic v. CACI, Inc.-Federal*, 413 F.Supp.2d 1329, 1337 (N.D. Ga. 2006), (USERRA "was intended to preempt employer-employee agreements that limit rights provided under USERRA or put additional conditions on those rights.")

Defendants completely misstate the holdings in the cases they cite, selectively cite dicta from non-binding cases, and completely omit the binding authority on this issue in an obvious effort to mislead this Court. The controlling case law is clear that Plaintiff's claims are not subject to any compulsory arbitration provision and that a district court of the United States is the forum in which Plaintiff's USERRA claims shall be litigated.

The first case on which Defendants rely in their moving papers, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), is readily distinguishable from the case at bar, as it stands for the proposition that in a CBA, an employee can waive certain rights under an anti-discrimination statute as long as the agreement to waive such rights is explicitly stated in the CBA and "clearly and unmistakably requires union members to arbitrate" claims *arising under the statute at issue. Id.* at 24 (emphasis added). Similarly, *Jensen v. Calumet Carton, Inc.*, No. 11 C 2785, 2011 WL 5078875 (N. D. Ill. Oct. 25, 2011) involved a Title VII claim for hostile work environment in which the CBA at issue specifically prohibited discrimination against an employee because of the employee's sex and explicitly informed the plaintiff of his agreement to arbitrate such claims. Because the plaintiff's claims related to alleged discrimination based on his sex and the CBA contained a "clear and unmistakable" provision requiring him to arbitrate these claims, the defendant's motion to compel arbitration was granted. *Id.* at *3.

LOA-24 does not contain a "clear and unmistakable" waiver of Plaintiff's and the Class' USERRA rights, *the statute at issue in this case*. LOA-24 simply reads that "[a]ny dispute . . . over the allocation methodology" had to proceed "under the dispute resolution provisions of Section 40, Part 3, Paragraph J of ALPA's Administrative Manual." *See*, ECF 161 p. 20; SOF ¶¶ 36-37; Exhibit 3 to SOF at ¶¶ 3(b), 6-7. Further, Section 40, Part 3, Paragraph J of ALPA's Administrative Manual does not contain a "clear and unmistakable" waiver of Plaintiff's and the Class' USERRA rights. Exhibit 7 to SOF.

Defendants next rely on a progeny of cases that, unlike the present matter, include specifically-agreed-to arbitration provisions in individual employment agreements.[5] These decisions do not relate to CBAs like the case at bar, and Plaintiff never signed an individual agreement to arbitrate. As such, these cases are inapplicable.

And perhaps most notably, but conspicuously absent from the cases Defendants cite, is *Garrett v Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006). *Garrett* is another case that compelled arbitration for an employee asserting USERRA rights who was bound by specific provisions relating to his own individual terms of employment. *Id.*[6] The *Garrett* Court acknowledged and confirmed the binding authority of *Fishgold*, *McKinney* and the persuasiveness of a progeny of cases that followed which "prevented intrusions into the substantive rights of veterans by the operation of laws, contracts, or plans to which the employee was not or could not be a party." *Id.*, at 680 n.10 (citing *McKinney, supra.,* 357 U.S. 265 (1958) (collective bargaining agreements requiring use of a contractual grievance process are preempted by the statute when an employee asserts the rights to restoration and advancement created by the statute); *Fishgold, supra,* 328 U.S. 275, (1946) (1940 statute is the basis for determining the seniority rights of a reemployed veteran, not the collective bargaining agreement or an arbitrator's interpretation of the agreement pursuant to a prior grievance proceeding); *Beckley v. Lipe–Rollway Corp.,* 448 F.Supp. 563 (N.D.N.Y.1978) (1978 version of statute required that reemployed veteran receive pension credits despite contrary policies and practices derived from terms of collective bargaining agreement and pension plan); *Kidder v. Eastern Air Lines, Inc.,* 469 F.Supp. 1060 (S.D.Fla.1978) (an employee on military leave of absence was not required to exhaust the grievance process in the union contract and was entitled to holiday pay benefits despite contrary provision in collective bargaining agreement).[7]

---

[5] In *Kitts v. Menards, Inc.*, 519 F. Supp. 2d 837 (N.D. Ind. 2007), an employee who signed a comprehensive arbitration agreement included in his employee agreement that he conceded was subject to the Federal Arbitration Act and who also conceded that his USERRA complaint was among the provisions in the arbitration agreement was compelled to arbitration. Similarly, in *Landis v. Pinnacle Eye Care LLC*, 537 F.3d 559 (6th Cir. 2010), a physician signed an employment agreement that included a specific provision to arbitrate pursuant to the rules of the American Arbitration Association and was compelled to arbitration.

[6] Prior to deploying to Iraq in 2003, Garrett was fired, allegedly based on his status as a Marine Reserve Officer. Accordingly, Garrett sued under USERRA, and the district court agreed that § 4302(b) of USERRA overrides the enforcement of the arbitration agreement. The Fifth Circuit reversed, and in a very narrowly worded holding, held that § 4302(b) of USERRA does not preclude the enforcement of *individual contracts* to arbitrate such disputes. (emphasis added)

None of the cases Defendants relied upon align with the facts at issue here since LOA-24 does not contain a "clear and unmistakable" waiver of Plaintiff's USERRA rights and Plaintiff did not sign any individual agreement to arbitrate his USERRA claims. *See* Exhibits 6 and 7 to SOF. Moreover, there is not one published opinion that holds what Defendants would have this Court rule, specifically that LOA-24 and its overbroad, general arbitration provision regarding

---

[7] The Court in *Garrett* also noted the long-standing and explicit distinction made by the Supreme Court between collective bargaining arbitration agreements and individually executed pre-dispute arbitration agreements and its ultimate conclusion that the "former may not be subject to arbitration while the latter are." *Id.* at 680. *See also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) ("[A]n employee's contractual rights under a collective-bargaining agreement are distinct from the employee's statutory…rights.")

"any dispute…over the allocation methodology" waives the fundamental statutory rights conferred by USERRA to Plaintiff and the Class. *Id.*

If Defendants' overbroad and incorrect assertion that USERRA claims are subject to binding arbitration pursuant to vague, unspecific terms in a collective bargaining agreement, which they are not, then every employer would negotiate CBAs that contain such provisions, rendering moot Sections 4302(b) and 4323(b)(2) of USERRA. Such a result was not the intent of Congress, does not comport with the black-letter law on the issue, and cannot be right.

Moreover, the assertion that Arbitrator Bloch would somehow be qualified to hear Plaintiff's USERRA claims is not supported by binding case law. The Supreme Court has made it clear that "a labor arbitrator has authority only to resolve questions of contractual rights." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53-54 (1974). The arbitrator's "task is to effectuate the intent of the parties" and he or she does not have the "general authority to invoke public laws that conflict with the bargain between the parties." *Id.* at 53. Furthermore, there is no mention in the ALPA Administrative Manual that Arbitrator Bloch was being tasked with hearing statutory challenges brought pursuant to USERRA. *See* Exhibit 7 to SOF.

Highlighting Arbitrator Bloch's inability to adequately decide USERRA matters, he attempted to dispose of any USERRA issues in his decision by simply stating: "ALPA is not an employer and is not, therefore, subject to USERRA's requirements. Notwithstanding, ALPA does have a duty to fairly represent its members . . ." *See* Exhibit 9 of SOF, p. 27.[8] This is where Arbitrator Bloch's analysis ends regarding USERRA, and instead he applied a fair duty of representation analysis, which has no relevance regarding USERRA claims. *Id.*

---

[8] The only mention made by Defendants of the definition of "employer" in its moving papers is hidden in Footnote #14, where they baselessly claim that "ALPA and UCH reserve their arguments that they were not and are not 'employers' of Plaintiff under USERRA." ECF #161, fn. 14. ALPA and the Company clearly are "employers" under USERRA. 20 C.F.R. § 1002.5(d)(1)(i) (An "employer" includes an organization to whom employment-related responsibilities have been delegated).

C. The Company's Former Methodology for Calculating DC Plan Pension Contributions for Pilots Relating to Military Leave Violates USERRA as Set Forth in Count II.

The methodology for calculating DC Plan contributions as set forth in the Pilot Bulletin violates USERRA by underfunding the DC Plans for Plaintiff and the putative Class relating to periods of military leave. When comparing the DC Plan contributions made to pilots with comparable BESs [Base, Equipment, Seat], it is irrefutable that pilots with no military obligations have been provided more in pension contributions by the Company than those pilots who perform military service. Defendants' records clearly show that Plaintiff was significantly underpaid DC Plan contributions due to his military service when compared to pilots with similar seniority, who flew in the same BES, who would have earned the exact same hourly rate, and who were not absent due to military leave or other forms of leave from Company service ("Comparison Pilots"). *See* Exhibit 19 to the SOF. For example, the evidence shows that from July, 2009 through May, 2011 (a period in which Plaintiff was on military leave), Plaintiff received $2,116.76 less in DC Plan contributions than the Comparison Pilots received on average over the same time period.[9] *Id.* at pp. UNITED000681-000684; Exhibits 15 and 17 to SOF. This comparison alone establishes Plaintiff's allegations that his DC Plan was underfunded during periods of military leave.

USERRA only allows an employer to look back to the 12-month period prior to uniformed service to determine the employee's rate of pay when the rate of pay is not reasonably

[9] The date funds posted for the Comparison Pilots as referenced in Exhibit 19 relate to the DC Plan contributions earned in the prior month (i.e. a 8/17/2009 posting date relates to DC Plan contributions relating to July, 2009). Comparison Pilot G9052 was excluded from this calculation because he was on a Company leave of absence during the periods in question, was not working for the Company, received no compensation other than vacation pay out, and his only DC Plan contributions are related to his vacation pay out. He is excluded from all calculations because he was not continuously employed with the Company during this comparison time period. *See* Exhibit 19 at United 001360-001361.

certain. 20 C.F.R. §1002.267(b)(1).[10] Defendants attempt to support their position of using a 12 month look back by stating that "far from being reasonably certain, individual pilot compensation . . . varies greatly from month to month." ECF # 161 § IV(a). However, Plaintiff's pay was reasonably certain because the Company could look to the earnings of the Comparison Pilots to determine the compensation Plaintiff would have received had he been continuously employed, and the corresponding DC plan contributions while he was on military leave. The data provided in SOF ¶ 60, that the Company relies on in arguing Plaintiff's compensation is not "reasonably certain" is essentially meaningless, because the reason Plaintiff's actual pay or earnings did fluctuate was precisely because he performed military service during most of those months. *See* Exhibit 12 of SOF. For the Comparison Pilots, the only time there was a significant change in earnings and corresponding DC Plan contributions, was when there were BES changes, which resulted in either increases or decreases to each pilots' hourly rates. *See* Exhibit 19 of SOF. These are the only variations that Plaintiff should have seen to his DC Plan contributions as well, and as such, monthly DC Plan contributions should be relatively consistent from month to month, and consistent with those of the Comparison Pilots.

In any event, when the Company used the "12-month look-back" method in a futile effort to mimic USERRA's language, it did not use the actual "12-month look back" method required by USERRA. Specifically, it did not look back to the "12 month period *prior to the period of uniformed service*" as USERRA requires, but instead used the previous 12 months in which there was no military leave taken. *Id.*, SOF at ¶62. When employees take short term military leave on a

[10] "Where the employee's rate of compensation must be calculated to determine pension entitlement, the calculation must be made using the rate of pay that the employee would have received but for the period of uniformed service." (20 C.F.R. §1002.267(a).) "Where the rate of pay the employee would have received is not reasonably certain, such as where compensation is based on commissions earned, the average rate of compensation during the 12-month period prior to the period of uniformed service must be used." (20 C.F.R. §1002.267(b)(1).) Defendants selectively omitted the specific example of commission-based compensation used in the Regulations. (ECF #161, p. 22.) Plaintiff is not a commission-based employee, like a real estate agent or stock broker, but instead is paid at a specific hourly rate.

monthly basis, as was typically the case for Plaintiff, it results in a non-consecutive 12 month period on which plan contributions are made that does not take into account any increase in hourly rate based on longevity (i.e. seniority), nor any increase in pay based on a BES change, because the compensation being utilized to determine the DC Plan contributions is based on pay rates earned years before the military leave is taken. In short, the "12-month look-back" period that the Company baselessly claims "undeniably tracks" USERRA does in fact the opposite and is patently unlawful.

The manner in which the Company policy prior to June 30, 2014 violates USERRA is evident when comparing it with the successor policy. The new policy reviews the past hour history, then utilizes those average hours with the actual hourly rates, including longevity pay increases. *See* Exhibit 21 to SOF, §§1, 2. Unlike the previous policy, it does not rely on past pay or past compensation, where the hourly pay rates used may be far less than the hourly pay rate the pilot would have received had he never left due to military service. *Id.* at § 2; Exhibit 16 to the SOF. The methodology in the Pilot Bulletin was not based upon the earnings that Plaintiff and the putative Class would have received had they been continuously employed, fails to account for annual or longevity pay increases, and therefore violates USERRA.

D. The RLA Does Not Deprive the Court of Jurisdiction Over Any of Plaintiff's Claims

In this case, Plaintiff's claims relating to the DC Plan calculation methodology stem from the Pilot Bulletin, not from the CBA. SOF at ¶ 62; Exhibit 16 to SOF. Despite this undisputed fact, the Company Defendants contend that the RLA deprives this Court of jurisdiction over Counts II and V of the TAC because it is a "minor dispute" under a CBA and must be arbitrated. ECF # 161, § IV(B). Not so. Even if the CBA had provided for the DC Plan calculation methodology, which it did not, USERRA provides the independent statutory basis for Plaintiff's claims.

In addition to the plethora of authority (including binding Supreme Court precedent) in the similar analysis above regarding compulsory arbitration pursuant to a CBA, Plaintiff's claims are brought under USERRA, and "where there is a statutory basis for the claim, [a] 'major/minor dispute' analysis becomes irrelevant." *Stokes v. Norfolk & Southern Ry.*, 99 F. Supp.2d 966, 971 (N.D. Ind.2000). *See also, Carpenter v. Northwest Airlines, Inc.*, 2001 U.S. Dist. LEXIS 24622 at *8 (D. Minn. June 7, 2001); *Lennon v. Finegan*, 78 F. Supp.2d 258, 259 (S.D.N.Y. 2000) (The preemption doctrine does not govern questions relating to the compatibility of federal laws.)

Moreover, the Supreme Court has held that the RLA does not automatically preclude all claims brought under independent federal statutes even if those same claims could have been grieved through the RLA procedures. *See, e.g., Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 563-64 n. 10 (1987). Other courts have analyzed the preclusive effect of the RLA based on whether the plaintiff's claim is "inextricably intertwined" with the language of the CBA and under this framework, a federal claim is precluded by the RLA only if its resolution depends on the interpretation of the CBA. *See, e.g., Gore v. TWA*, 210 F.3d 944, 949 (8th Cir. 1999); *see also Schiltz v. Burlington N. R.R.*, 115 F.3d 1407, 1415 (8th Cir. 1997); *Brown v. Ill. Cent. R.R.*, 254 F.3d 654, 661 (7th Cir. Ill.2001). Because Plaintiff's claims relating to the DC Plan calculation methodology stem from the Pilot Bulletin, not from the CBA, there is no language of the CBA that needs to be interpreted and the claims are certainly not "inextricably intertwined" with the language of the CBA.

RLA preclusion is not warranted when the claims arise out of a federal anti-discrimination statute. *See, e.g., Blakely v. USAirways, Inc.*, 23 F. Supp. 2d 560, 564-66 (W.D. Pa. 1998) (the RLA did not preclude the plaintiff's claims even though she had to rely on the

CBA to prove she was eligible under the CBA to assert a claim); *Kidder*, 469 F. Supp. at 1063 (no RLA preclusion even where the plaintiff alleged she was discriminated against under the preceding USERRA statute with regard to denial of paid holiday, as provided in the CBA). As long as a plaintiff's dispute does not require interpretation of the CBA, and even if the disputed provisions of the CBA are relevant but not dispositive, then the underlying federal claim is not precluded by the RLA. *See Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994). As articulated by the Ninth Circuit in *Saridakis v. United Airlines*, 166 F.3d 1272 (9th Cir. 1999):

> While we have yet to squarely address the intersection of the ADA and the RLA, we have held that rights created by other anti-discrimination statutes such as Title VII and California's Fair Employment and Housing Acts are independent of a CBA and thus claims brought pursuant to these acts are not minor disputes. *See Espinal v. Northwest Airlines,* 90 F.3d 1452, 1456-58 (9th Cir. 1996) (RLA does not preempt claim under the FEHA); *Felt v. Atchison, Topeka & Santa Fe Railway Co.*, 60 F.3d 1416, 1419 (9th Cir. 1995) (Title VII claim independent of CBA); *Jimeno v. Mobil Oil Corp.,* 66 F.3d 1514 (9th Cir. 1995) (FEHA claim for disability discrimination in employment independent, not preempted); *Ackerman v. Western Electric Co.*, 860 F.2d 1514, 1517 (9th Cir. 1988) (same). Similarly, the ADA provides an "extensive and broad[] ground for relief, specifically oriented towards the elimination of discriminatory employment practices." *Benson v. Northwest Airlines*, 62 F.3d 1108, 1115 (8th Cir. 1995).

Id. at 1276-1277.

Defendants rely heavily on *Carder v. Continental Airlines, Inc.*, a case that is an outlier, was decided incorrectly in the face of well-established precedent and persuasive authority to the contrary, and was based upon a different theory than the present case.[11] ECF #161, pp. 12, 29, 35-36. Although Defendants hang their hats on *Carder*, it is the only case they cited that even refers to RLA preclusion relating to USERRA violations and is clearly not binding on this Court. Moreover, and contrary to Defendants' assertion, the pension claims involved in the *Carder* case

[11] The pension contribution claim in the *Carder* case focused on the scheduling practices of Continental, attempted to address pilot seniority, hourly pay rates, longevity, a Preferential Bidding System ("PBS") that was a scheduling tool that forced pilots to work on days off, get fewer trips and get trips that paid fewer hours, and included the policy requiring the early submission of military orders prior to a certain date each month such that PBS would penalized those with military service commitments. *Carder v. Cont'l Airlines, Inc.*, No. 09-CV-3173, Doc. 81, (S.D. Tex. Feb. 6, 2013).

were never brought in front of the Fifth Circuit on any appeal. *Carder v. Cont'l Airlines, Inc.*, No. 14-20291, 595 FED. APPX. 293 (5th Cir. Dec. 10, 2014).

Defendants' arguments regarding RLA preclusion are also glaringly inconsistent with judicial admissions made in other similar, recent USERRA cases filed against the Company. In *LaTourrette v. United Airlines Inc.*, the United States Department of Justice brought a USERRA complaint on behalf of Teneyck LaTourrette, a United pilot, alleging that the Company underfunded his defined contribution pension plan when he was absent from the Company performing military service. *LaTourrette v. United Airlines, Inc.*, No. 12-CV-0635-WJM-CBS, Doc. #1 ¶¶14-29 (D. Colo. Mar. 13, 2012). In *LaTourrette*, the Company explicitly acknowledged, and the Court agreed, that jurisdiction and venue in a United States District Court were proper and necessary for USERRA matters. *Id*, Doc. #12 ¶¶4-6. Shortly after *LaTourrette* was settled, James Tuten, another United pilot, filed a USERRA class action lawsuit bringing the same allegations as *LaTourrette* but on a class-wide basis for damages dating back to 2000, alleging that United under-calculated Defined Contribution Pension payments to the United pilots as a whole when those pilots were absent due to military obligations. *Tuten v. United Air Lines, Inc.*, No. 1:12-cv-01561-WJM-MEH (D. Colo. June 15, 2012). Again, the Defendants agreed and the Court concluded that jurisdiction and venue were proper for the same type of USERRA claims as presented in this case. *Id.*, Doc. #33. Count II in this case is substantially similar to both the *LaTourrette* and *Tuten* cases; specifically that the Company underpaid pension plan contributions for pilots due to their military leave.

It is clear that USERRA provides the independent statutory basis for Plaintiff's claims; and even if it didn't, Plaintiff's DC Plan claim does not require interpretation of any CBA to establish how the Company discriminates against its pilots with military service obligations. When one compares the Comparison Pilots with Plaintiff, the undisputed evidence shows that the non-military pilots closest to Plaintiff in BES (the Comparison Pilots) on average received more in DC Plan contributions than Plaintiff during the time period that Plaintiff was on military leave. This is discriminatory, it cannot be disputed, does not require any interpretation of the CBA, and accordingly Defendants' motion should be denied on these grounds.

E. The Company's Policy and Practice Regarding Verification of Military Leave Violated USERRA as Set Forth in Count III.

The verification policy set forth in the Pilot Bulletin violates USERRA and results in the late funding and underfunding of DC Plan contributions. The evidence in the record is conclusive, and shows that Plaintiff has not received pension contributions he was owed. Specifically, Plaintiff's military leave periods on April 23, 2007, and June 1, 2011 were not verified by the Company until years after the leave was taken, and his military leave taken during the week of February 21, 2012 has never been verified, nor have pension plan monies been paid for this military leave or for Plaintiff's April 23, 2007 military leave. Exhibits 12, 13, 15 and 17 to SOF.

USERRA requires employees who have been on military leave for 31 days or more to submit documentation for reemployment to establish that the application is timely, that the employee has not exceeded the protected service period (subject to exceptions), and that the conditions of the employee's service and discharge were such that they preserve his rights under USERRA. 20 C.F.R. §1002.121. Seven types of documents are defined in 20 C.F.R. §1002.123(a) that may be submitted to an employer upon reemployment for military leave of 31 days or more, of which LESs are one. "The types of documents that are necessary to establish eligibility for reemployment will vary from case to case. Not all of these documents are available or necessary in every instance to establish reemployment eligibility." 20 C.F.R. §1002.123(b).

The verification policy itself violates USERRA because an employee is not required to submit written documentation for any military leave periods less than 31 days for any reason, including pension plan eligibility. 20 C.F.R. § 1002.121. Defendants' argument that no verification documentation "was rejected" is a red herring. ECF #161, pp. 27-28. The Company admits that Plaintiff generally complied with the unlawful "verification" requirement and provided orders covering his periods of military leave including those shorter than 30 days. SOF, ¶49. Accordingly, Plaintiff was and is fully eligible for all pension contributions under USERRA, including the short-term leave taken from February 21, 2012 to February 28, 2012, for which no documentation was required or provided by Plaintiff. Moreover, LESs (the military pay records required by the Company) only indicate dates when actual military service is performed and do not include travel days, which are to be included in pension calculations under USERRA. 20 C.F.R. § 1002.259(a). Plaintiff has never been compensated in his DC Plan for any travel days as these dates are excluded by the Company's policy, another clear and prima facie violation of USERRA.

The Pilot Bulletin also unilaterally states that "Military Leave can be verified for up to 6 months after the month of the Military Leave," which violates USERRA by ignoring the 90-day time period requirement during which pension contributions must be made. Exhibit 16 to SOF; 20 C.F.R. § 1002.262. The Company's own data clearly and unmistakably shows delays in verifying military leave that far exceed 90 days, and again proves Plaintiff's assertions that the Company's verification policies violate USERRA. Furthermore, based on the deposition testimony of Ida Olivera, "over the years" prior to 2007, other documentation may have been accepted by the Company to verify periods of military service going back to approximately the year 2000, but the Pilot Bulletin makes clear that only LESs (military pay records) were accepted by the Company and pilots were required to provide copies of their pay records to the chief pilot offices. Exhibit 20 to SOF, pp. 42:1-44:4, 53:21-54:1, 109:6-110:14, 117:3-11; *see also* Exhibit 16 to the SOF. At a minimum, whether other verification documentation beyond pay records were actually accepted after March 13, 2007 is a genuine issue of triable fact, although the

Company's policy is undisputedly in violation of USERRA by requiring only LESs (military pay records). Accordingly, Defendants' motion should be denied on this count for this reason alone.

The events following the filing of Plaintiff Duffer's lawsuit on February 8, 2013, exemplify the Company's egregious, intentional and willful misconduct and numerous USERRA violations. On April 4, 2014, nearly seven years after his military leave date and over one year after the filing of this lawsuit, the Company finally "verified" Plaintiff's April 23, 2007 military leave period. Exhibit 12 to SOF p. 21. Then, on September 25, 2014, deep into discovery and months after being put on notice of its USERRA violations, the Company verified and made a payment to Plaintiff Duffer for his June 1, 2011, military leave period, in the amount of $38.68. SOF, ¶66. Utilizing calculations only it knows, and wholly unverifiable by Plaintiff, the Company also included an "investment return" payment in the amount of $11.29 attributable to the delay in making a pension contribution for the June 1, 2011 military leave date, indicating that the Company does have some method to calculate the value of delayed pension payments. SOF, ¶67. Notably, there have been no "investment return" payments for any of the other late pension contributions relating to Plaintiff's DC Plan. For example, the Company made late DC Plan payments totaling $9,400.09 on January 20, 2012, nearly eight months following Plaintiff's return from the military leave period (October, 2010 through May, 2011) to which this contribution was related, yet no "investment return" payment was made relating to this late contribution. *See* Exhibits 15 and 17 of the SOF. Furthermore, the military leave during the week of February 21, 2012 has still not been verified, nor have DC Plan contributions been made by the Company relating to this short term military leave. SOF, ¶50, 51.

It is an undisputed material fact that during the three year period for which information was provided through limited discovery in this case, numerous periods of military leave taken by

Plaintiff while employed by the Company were "verified by" the Company more than 90 days after Plaintiff was reemployed, and DC Plan contributions associated with periods of military leave were made more than 90 days after Plaintiff was reemployed and more than 90 days after Plaintiff's military leave was "verified" by the Company. SOF, ¶¶50, 53, 64, 65; Exhibits 12, 13, 15 and 17. These were not one-off events, and they evidence a pattern of willful violations.[12]

Incredibly, Defendants claim that Plaintiff Duffer lacks standing to bring this suit, even though their own records prove that Plaintiff has yet to receive DC Plan contributions for certain military leave dates, received contributions more than 90 days following his return to the Company, received payment for other military leave dates only after he filed this lawsuit and has not received any "investment return" payments for any of his other late contributions other than for the June 1, 2011 period. The verification issue plainly evidences the Company's clear USERRA violations and Defendants' motion should be denied in its entirety.

F. ERISA Does Not Preempt Plaintiff's State Law Claims (Counts IV & V), because they Are Derivative of the USERRA Claims.

In their MSJ, Defendants contend that ERISA preempts the CMVC § 394 and Negligence claims. Defendants' arguments fail for many reasons. They rely on the supersession provision of §514(a) of ERISA.[13] They argue that preemption applies if the state law "relates to" an employee retirement benefit plan, i.e., an interpretation of the plan is required. ECF #161, at 29. However, Plaintiff is not challenging the plan itself, but rather the Defendants' adoption of practices that resulted in the discrimination of military members. Furthermore, §1144(d) states that "nothing... shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the [U.S.]" It is necessary to examine the intent of Congress to decide whether a federal law preempts state law. *Shaw v. Delta Airlines,* 463 U.S. 85, 96 (1983). Congress intended for ERISA plans to be subject to USERRA. *See* 20 CFR §1022.260; *Shaw,* 463 U.S. at 505-06.[14] State laws are only preempted to the extent they are inconsistent with federal laws. *Humana Inc. v. Forsyth*, 525 U.S. 299, 310-11 (1999).[15] Congress denied preemption of state laws that further the purposes of USERRA. 38 U.S.C. § 4302(a).[16] Like USERRA, CMVC § 394(a) prohibits the discrimination of military persons. Also, the duty under the Negligence claim stems from USERRA. The California claims are based on conduct equally actionable under USERRA, and they cannot be preempted.

---

[12] Realizing that the undisputed evidence proves these bright line USERRA violations, in well-documented meet and confer correspondence, the Company Defendants attempted to exclude these facts from the final product. Despite this Court's Order, the Company incredibly claims these facts are neither "undisputed" nor "material." (ECF #161, FN. 1.) The Company continues their procedural maneuvering by fabricating a new claim title (Untimely Contribution Claim rather than Verification Claim) and baselessly stating that no discovery occurred on this issue, when in fact, Plaintiff specifically requested and received documentation from the Company regarding the timing of Plaintiff's pension contributions attributable to his military leave. (Id.) They then brazenly state that the "Company did not (and could not) identify it as among the issues." (Id.) If that was the case, then why did Defendants retroactively "verify" previous unverified military leave dates, and why did Defendants make a pension payment attributable to Plaintiff's June 1, 2011, military leave date? Defendants' actions belie their transparent words.

[13] "...the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan..." 29 U.S.C. § 1144(a).

Defendants also argue for preemption under §502 of ERISA. The Seventh Circuit has created a three-factor test for preemption under §502: (1) whether Plaintiff can bring a claim under that section, i.e., for an administrator's refusal to supply information, or to recover or clarify benefits/rights under the terms of the plan; (2) whether the cause of action falls within the scope of an ERISA provision; and (3) whether Plaintiff's state law claim requires interpretation of a contract governed by federal law. *Klassy v. Physicians Plus Ins. Co.*, 371 F.3d 952, 955 (7th

---

[14] During ERISA floor debates, various Congressmen voiced that a nondiscrimination amendment wasn't required because laws already existed to protect against discrimination. *Shaw,* 463 U.S. at 505-06.

[15] "To the extent the New York law prohibited practices also prohibited under federal law, we explained, the New York law was not preempted."

[16] "Nothing in this chapter...shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter..."38 U.S.C. § 4302(a).

Cir. 2004). Under the first factor, Plaintiff is not seeking benefits under the terms of the plan, nor is there an administrator's refusal to supply information. As for the second factor, ERISA does not contain any sections regarding antidiscrimination, so the California claims do not fall within the purview of any ERISA provision. Under the third factor, the state law claims do not require interpretation of a contract governed by federal law. All three factors weigh heavily in favor of non-preemption.

G. Plaintiff's Negligence Claim is not Preempted (Count V)

Defendants are liable for negligence. California law applies, because Plaintiff is a resident of California. *Butner v. Boehringer Ingelheim Pharms., Inc.*, 2014 U.S. Dist. LEXIS 3946, *12 (S.D. Ill. 2014). The elements for negligence under CA law are: "(a) a *legal duty* to use due care; (b) a *breach* of such legal duty; [and] (c) the breach as the *proximate or legal cause* of the resulting injury.'" *Ladd v. County of San Mateo*, 12 Cal. 4th 913, 918 (1996). Legal duties may arise from statutes. *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 803 (1979). In deciding proximate cause, courts look to (1) "causation in fact," i.e., whether the injury would have occurred absent the negligence, and (2) policy considerations, i.e., the fairness aspect. *Evan V. v. Hughson United Methodist Church*, 8 Cal. App. 4th 828, 834-35 (1992).

In this case, Defendants owed a duty of care to the Plaintiff and the putative Class to not discriminate against them based on their status as military members—a duty imposed by both USERRA and CMVC § 394. The Defendants breached this duty by excluding military leave periods when determining the total amount and allocation of the lump sum payment, and determining the calculation and processing of pension contributions, including the implementation of an improper verification process. Furthermore, imposition of liability for discrimination based upon military service obligations is consistent with public policy, as is evident by the creation of statutes protecting against such discrimination. Plaintiff's damages include, but are not limited to loss of past and future benefits.

Defendants argue that the negligence claim is barred by the Illinois Worker's Compensation Act ("IWCA"). However, Defendants' argument is misguided as the IWCA is only a remedy for "accidental injuries"—those which are "traceable to a definite time, place and cause, and occurs in the course of employment unexpectedly and without affirmative act or design of the employee." *McPherson v. City of Waukegan*, 379 F.3d 430, 442 (7th Cir. Ill. 2004). In order "[t]o escape the exclusivity provision of [IWCA], plaintiff must 'prove either that the injury (1) was not accidental (2) did not arise from [] employment (3) was not received during the course of employment or (4) was noncompensable under the Act.'" *Meerbrey v. Marshall Field & Co.,* 189 Ill. App. 3d 1085 (Ill. App. 1989), aff'd, 139 Ill. 2d 455 (Ill. 1990)). The IWCA was not intended to encompass the type of injury in this case, and thus, is noncompensable under the IWCA. The IWCA, as well as the Commission's Handbook,[17] constantly use "injury" interchangeably with "accident," "physical injury," and the like,[18] but never use the term to describe purely monetary harm.[19] In this case, Plaintiffs' loss of benefits are not covered by the IWCA.

VI. CONCLUSION

For the foregoing reasons, the Court should deny Defendants' MSJ in its entirety.

---

[17] Handbook on Workers' Compensation and Occupational Diseases, http://www.iwcc.il.gov/handbook020106.pdf

[18] The IL Workers' Compensation Commission provides various FAQs and answers, among which is the following: Q: "[w]hat injuries and diseases are covered under the law?" A: "The Worker's Compensation Act provides that *accidents* that arise out of and in the course of employment are eligible to receive workers' compensation benefits…." Handbook, at 3 (emphasis added).

[19] Some courts have construed "injury" to include emotional distress injuries stemming from incidents such as sexual harassment. *See Finnane v. Pentel of Am., Ltd.,* 2000 U.S. Dist. LEXIS 22172 (N.D. Ill. 2000).

Dated: June 8, 2015

Respectfully Submitted,

MARK DUFFER, an individual, on behalf of himself and all others similarly situated

By: /s/ Gene J. Stonebarger
One of the Attorneys for Plaintiff
and the Proposed Putative Class

Brian J. Lawler (admitted *Pro Hac Vice)*
PILOT LAW, P.C.
1551 9th Avenue
San Diego, CA 92101
Telephone: (866) 512-2465
blawler@pilotlawcorp.com

Gene J. Stonebarger (admitted *Pro Hac Vice)*
Richard D. Lambert (admitted *Pro Hac Vice)*
STONEBARGER LAW
A Professional Corporation
75 Iron Point Circle, Suite 145
Folsom, CA 95630
Telephone: (916) 235-7140
gstonebarger@stonebargerlaw.com
rlambert@stonebargerlaw.com

Liaison Counsel:

Joseph J. Siprut
Gregg M. Barbakoff
SIPRUT PC
17 North State Street, Suite 1600
Chicago, Illinois 60602
312.236.0000
jsiprut@siprut.com
gbarbakoff@siprut.com

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2015, I have caused a true and correct copy of the foregoing **Plaintiff's Memorandum of Law In Opposition to Defendants' Motion for Summary Judgment** to be served upon all parties and counsel of record through the Clerk of Court using the CM/ECF system, which will serve a Notice of Electronic Filing upon all attorneys of record, all of whom are registered users.

By: /s/ Gene J. Stonebarger